UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TYRONE KEYS, Plaintiff, v. BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN and the NFL PLAYER DISABILITY & NEUROCOGNITIVE BENEFIT PLAN, Defendants.	Case No. 8:18-cv-02098-CEH-JSS

DEFENDANTS' MOTION TO DISMISS COUNT THREE OF PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendants Bert Bell/Pete Rozelle NFL Player Retirement Plan and NFL Player Disability & Neurocognitive Benefit Plan (together, "Plans") move to dismiss count three of Plaintiff Tyrone Keys' First Amended Complaint ("Amended Complaint," ECF 35) with prejudice. Count three seeks "equitable estoppel" under section 502(a)(1)(B) of ERISA based on the plan administrator's ***silence***. As the Court recognized in its May 28, 2019 Order (ECF 28), silence does not give rise to an equitable estoppel claim. For this reason, and for the reasons stated more fully below, Keys' re-pleaded count three fails to state a claim upon which relief can be granted, and the Court should dismiss the claim with prejudice.

BACKGROUND[1]

On October 29, 2018, Defendants moved to dismiss counts one and three of Keys' original Complaint. *See generally* Mot. to Dismiss Counts I and III (ECF 19). On May 28, 2019, the Court granted the motion, in part, and dismissed count three, with leave to amend. *See generally* 5/28/19 Order (ECF 28) at 13-15. Count three attempted to state a claim for "equitable estoppel" under section 502(a)(1)(B) of ERISA, 29 U.S.C. section 1132(a)(1)(B). The Court found the claim deficient because (1) "[i]t is unclear whether Keys may set forth a cognizable claim for equitable estoppel based upon silence under ERISA," and (2) "Keys fail[ed] to set forth the required elements of a common law cause of action" in any event. 5/28/19 Order at 15.

On June 11, 2019, Keys filed his First Amended Complaint ("Amended Complaint," ECF 35) with a rebooted version of count three. Count three now includes new allegations about documents Keys allegedly submitted, and allegations that Keys detrimentally relied on the plan administrator's silence—or, more accurately, the administrator's failure to identify and voice concerns about a 2002 car accident that he attempted to conceal from the Plans. *See, e.g.*, Am. Compl. ¶ 39 (alleging that Keys submitted "the second page of a report dated September 5, 2003 from chiropractor Richard Shaker" that mentioned "the May 7th, 2002 accident"); *id.* ¶ 46 (alleging that Keys "relied upon the DICC and the Board's long silence about the accident to his

[1] To avoid needless repetition, the Plans incorporate the background facts set forth in their prior Motion to Dismiss. *See generally* Mot. to Dismiss Counts I and III (ECF 19) at 3-6.

detriment").[2] These added allegations do not cure the legal deficiency. Keys still bases his equitable estoppel claim on silence, contrary to this Court's decision on May 28 and contrary to a litany of Eleventh Circuit cases.

It is now clear that Keys' cannot state a viable equitable estoppel claim. The Court should grant this motion and dismiss count three with prejudice.

STANDARD OF REVIEW

Keys must allege "enough facts to state a claim to relief that is plausible on its face;" he must allege facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In deciding a Rule 12(b)(6) motion to dismiss, the court accepts as true the factual allegations in the complaint and construes such allegations in the light most favorable to the plaintiff. *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1312 (11th Cir. 2015). While the scope of the Court's review is generally "limited to the four corners of the complaint," the court may consider documents outside of the complaint if (1) they are "central to the plaintiff's claim," and (2) their "authenticity is not challenged." *Speaker v. U.S. Dep't of Health & Human Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010).

[2] For the Court's convenience, **Exhibit A** is a highlighted version of the Amended Complaint that shows the new allegations in count three.

ARGUMENT & AUTHORITIES

I. There Is No Claim For Equitable Estoppel Based On Silence Under ERISA.

Count three of Keys' Amended Complaint alleges the plan administrator remained silent about documents submitted by Keys that should have alerted the plan administrator of possible fraud. *See, e.g.*, Am. Compl. at 11 ("Count III: Equitable Estoppel Based Upon Silence Under § 1132(a)(1)(B)"). Yet Eleventh Circuit precedent is clear that Keys has no claim for equitable estoppel based on a plan administrator's silence.

There is "a ***very narrow*** common law doctrine under Section 502(a)(1)(B) for equitable estoppel," but it applies only where a plan administrator makes affirmative representations about an ERISA plan's ambiguous provisions. *Jones v. Am. Gen. Life & Acc. Ins. Co*., 370 F.3d 1065, 1069 (11th Cir. 2004) (emphasis added). *See also Katz v. Comprehensive Plan of Grp. Ins.*, 197 F.3d 1084, 1090 (11th Cir. 1999) ("This circuit has created a very narrow common law doctrine under ERISA for equitable estoppel. It is only available when (1) the provisions of the plan at issue are ambiguous, and (2) representations are made which constitute an oral interpretation of the ambiguity.") (citations omitted); *Glass v. United of Omaha Life Ins. Co*., 33 F.3d 1341, 1347 (11th Cir. 1994) (same).

Equitable estoppel might apply if, for example, a health plan participant inquires about medical coverage; the administrator confirms that coverage is available; and then the administrator later denies coverage notwithstanding its prior representations. In that scenario, the participant could invoke equitable estoppel to hold the plan administrator to

its initial representations, assuming the plan terms are ambiguous and arguably support the participant's claim for coverage. That is ***not*** this case.

Count three lacks any allegation that the plan administrator affirmatively represented anything to Keys—much less that the administrator represented that the Plans would overlook discrepancies in the records Keys submitted, his fraud in general, or the approximately $1,000,000 overpayment that he received due to that fraud. Under settled Eleventh Circuit precedent, absent an affirmative representation of some kind, count three fails as a matter of law. Even Keys must by now acknowledge this result, given that he has "not cite[d] any cases where a federal court enforced a theory of equitable estoppel other than as provided by the 'narrow' exception in *Jones*." 5/28/19 Order at 14.[3]

Keys' equitable estoppel claim challenges the plan administrator's authority to collect an overpayment of benefits. *See* Compl. ¶ 45 ("The Board should be estopped from attempting to collect an alleged overpayment of benefits…"). The terms of the Plan unambiguously authorize the plan administrator to "[r]ecover any overpayment of benefits through reduction or offset of future benefit payments or other method chosen by the Retirement Board," without limitation. Plan Doc. § 8.2(n) (ECF 19-2, PageID 138). Keys has no equitable estoppel claim for this reason as well. *See Jones*, 370 F.3d at 1071

[3] Keys' estoppel-based-on-silence claim exemplifies why the Eleventh Circuit has not endorsed an estoppel claim that goes beyond the very narrow *Jones* exception. Keys' estoppel claim attempts to turn the plan administrator's silence—*i.e.*, a silence that he induced via his fraudulent concealment of documents and information—against the Plans, to prevent them from recovering Plan funds that he was never entitled to receive. Mere silence should not lead to such a perverse result.

("[B]ecause the Plan is unambiguous, the Appellants cannot make out a prima facie case of equitable estoppel.").

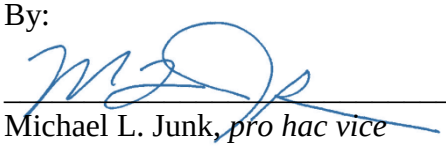
II. ERISA Preempts Any State Law Equitable Estoppel Claim.

Keys has not brought a state law cause of action, nor can he. As the Court recognized, ERISA preempts a state law estoppel claim. *See* Order at 13 ("'State common law claims relating to employee benefit plans, such as equitable estoppel, are preempted by ERISA.'") (quoting *Chiroff v. Life Ins. Co. of N. Am.*, 142 F. Supp. 2d 1360, 1364 (S.D. Fla. 2000)); *Kane v. Aetna Life Ins.*, 893 F.2d 1283, 1285 (11th Cir. 1990) ("[T]he district court correctly held that ERISA preempts all state common law claims relating to employee benefit plans, including appellant's equitable estoppel claim."). Thus, there is no scenario under which Keys could state a viable equitable estoppel claim.

CONCLUSION

Count three of the Amended Complaint fails to state a claim as a matter of law. The Court should dismiss it with prejudice.

Dated: June 24, 2019

By: 

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